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No. 89-781

In the Supreme Court of the United States

OCTOBER TERM, 1989

TOWN OF HUNTINGTON, ET AL., PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in requiring a showing of environmental harm to establish irreparable injury justifying the issuance of an injunction prohibiting the continued use, pending further agency evaluation, of an ocean site governed by the substantive criteria of the Ocean Dumping Act, 33 U.S.C. 1401 *et seq.*, where the site had been actively used for six years and the Corps of Engineers has nearly completed an expanded Environmental Impact Statement, to be used in determining whether to permit the continued use of the site.

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OPINIONS BELOW

The district court opinion of March 22, 1988 (Pet. App. A20-A32) is unreported. The court of appeals opinion of October 19, 1988 (Pet. App. A37-A54) is reported at 859 F.2d 1134 (*Huntington I*). The district court opinion of January 3, 1989 (Pet. App. A55-A60) is unreported. The court of appeals opinion of August 14, 1989 (Pet. App. A1-A17) is reported at 884 F.2d 648 (*Huntington II*). The district court opinion of October 26, 1989 (Pet. App. A64) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1989. The petition for a writ of certiorari was filed on Monday, November 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the designation by the United States Army Corps of Engineers of an open water site in Long Island Sound for the disposal of dredge spoil. In the fall of 1981, a group of land and marina owners from the Mamaroneck Harbor area of New York requested that the Corps designate a dredge material disposal site in the western Long Island Sound area, and modify pre-existing dredging permits to allow for disposal of their dredged material at the newly designated site.[1] The Corps determined that a site-specific Environmental Impact Statement (EIS) should be prepared for the designation of a new disposal site. On December 18, 1981, the Corps issued a draft EIS related solely to the designation of the proposed Western Long Island Sound site (WLIS III) as an open water disposal site for dredged material. The public comment period expired on January 18, 1982, and the Corps issued the final EIS on February 12, 1982. Pet. App. A39, A41-A43. On March 16, 1982, the Corps issued a Record

[1] The permits had been issued earlier in 1981. They initially designated an area known as the "Mud Dump Site" in the Atlantic Ocean off New Jersey as the disposal site. The permits were later modified to allow the disposal of the dredged material at the Central Long Island Sound disposal site off New Haven, Connecticut. The request to designate the Western Long Island site for disposal was therefore the second modification of these pre-existing permits. Pet. App. A40-A41.

of Decision which announced the designation of WLIS III as a disposal site, and issued the modification of the pre-existing disposal permits. Disposal operations at the WLIS III site commenced in 1982 and continued until June 1, 1988, when the initial district court injunction took effect. Pet. App. A5. During that period, more than 667,240 cubic yards of dredged material were deposited at the site.[2] See note 3, *infra*.

Shortly after the Corps issued its Record of Decision, petitioners (the Towns of Huntington, North Hempstead and Oyster Bay, and the Counties of Nassau and Suffolk and officials of those communities) filed suit against the Corps and its officials. The original complaint alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Petitioners filed a motion for a preliminary injunction approximately two months after filing suit, but then apparently abandoned that motion. On December 16, 1986, a second amended complaint added a claim for relief under the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*, also known as the Ocean Dumping Act.

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[2] The March 22, 1988, district court opinion states that "over 667,240 cubic yards of dredged material have been disposed of at WLIS III" (Pet. App. A27). The second district court opinion gives the amount as approximately 748,000 cubic yards (*id.* at A57). The recent Draft Supplemental EIS prepared by the Corps states that a total of 989,278 cubic yards were deposited at the site between 1982 and 1988. U.S. Army Corps of Engineers, *Draft Supplemental EIS for a Disposal Site for Dredged Material—Western Long Island Sound* (Dec. 1989).

On March 22, 1988, the district court issued a decision on the parties' cross-motions for summary judgment. It ruled that the Corps had erred in not applying the criteria set forth in the Ocean Dumping Act, 33 U.S.C. 1412(a), to the designation of WLIS III as an open water disposal site in Long Island Sound, and that the EIS prepared in 1982 for the site designation violated NEPA because it did not contain a discussion of the types, quantities and the cumulative effects of the dredged materials that might be deposited at the site (Pet. App. A20-A32). Without further discussion of remedy, the trial court issued a judgment enjoining the Corps from operating WLIS III until a Supplemental EIS had been prepared (*id.* at A33-A36).

On the Corps' appeal, the court of appeals affirmed the district court's ruling on the merits of the Ocean Dumping Act and NEPA controversies (Pet. App. A37-A54). The appellate court, however, agreed with respondents that the district court had not adequately evaluated the equities in imposing the injunction against operation of the WLIS III disposal site (*id.* at A53). Accordingly, the court of appeals remanded the question of remedy to the district court for further proceedings (*id.* at A54).

On remand, the district court declined to hold the evidentiary hearing requested by the Corps on the environmental conditions of the WLIS III disposal site. Instead, after oral presentations of counsel,[3] the

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[3] The Corps asserted that it had monitored conditions at WLIS III for more than six years, and that no environmental injury resulting from the dumping had occurred or was threatened. Counsel for petitioner Town of Huntington stated in the court of appeals that petitioners did not contest this assertion. Pet. App. A6, A8.

trial court re-entered the original injunction against operation of the disposal site. Pet. App. A55-A60. It ruled that petitioners had established irreparable injury by demonstrating a violation of the procedural requirements of the Ocean Dumping Act and NEPA; it stated that this injury outweighed the countervailing interests, which it characterized as "inconvenience and additional cost to owners of docks and piers" (*id.* at A59).

Respondents again appealed from the entry of injunctive relief. The court of appeals again reversed the injunctive order and remanded to the district court for an evidentiary hearing and consideration of the equities involved. Pet. App. A1-A16. The Second Circuit ruled that the district court had erroneously determined that "the establishment of a statutory violation, without more, warranted an injunction" (*id.* at A15). It ordered the district court, upon remand, to place the burden of establishing some actual or threatened irreparable injury to the environment on the petitioners (*id.* at A15-A16).[4]

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[4] The district court held an evidentiary hearing in accordance with this remand, to determine whether injunctive relief was appropriate once all equities and interests had been balanced (Pet. App. A65). The district court found that continued disposal of dredged material at WLIS III will not cause damage to the disposal site or surrounding area (*id.* at A66). The court held that petitioners had "failed to sustain their burden of showing irreparable damage to the environment", while "the increased cost of dumping dredged material at other locations would discourage dredging with the consequent risk to boats using ports, harbors and channels and cause severe economic loss" (*ibid.*). Consequently, the court denied petitioners' request for injunctive relief.

ARGUMENT

The decision of the court of appeals is correct. Although articulating the proper standard for evaluating requests for injunctive relief in connection with violations of the National Environmental Policy Act involves an important question of federal law, the present case does not present an appropriate context in which to address that issue. Even if this Court were to conclude that the interests protected by NEPA ordinarily obviate the need to show actual environmental harm in order to demonstrate irreparable injury, the result below would be correct because of the particular circumstances of this case. Moreover, the Supplemental Environmental Impact Statement ordered by the lower courts is almost completed, and the Corps of Engineers is expected to make a new decision designating an appropriate disposal site within a few months. Once the Supplemental EIS is completed and a new decision made, the issue presented by this petition will be moot.

1. Petitioners' primary submission (Pet. 7) is that the Second Circuit requires a showing of actual or threatened environmental harm to establish irreparable injury to support entry of injunctive relief for a violation of NEPA, and that this position is in conflict with the decisions of other circuits, notably *Sierra Club* v. *Marsh*, 872 F.2d 497 (1st Cir. 1989), *Massachusetts* v. *Watt*, 716 F.2d 946 (1st Cir. 1983), and *Foundation on Economic Trends* v. *Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985).[5]

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[5] Most of the other decisions on which petitioners rely (Pet. 7-9) predate this Court's decisions in *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), and *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), on which the court

Those decisions do articulate a broader theoretical basis upon which to predicate irreparable injury under NEPA—they postulate that agency decision-making might become biased if a project were allowed to proceed during the period in which supplementary environmental documents were being prepared to remedy a NEPA violation. 872 F.2d at 500-501; 716 F.2d at 952-953. The rationale behind this theory of irreparable injury rests on the observation that NEPA is an entirely procedural statute; it does not dictate that the ultimate agency decision conform to any particular environmental standards or requirements. Courts that have adopted this theory have expressed concern that a federal agency that becomes committed to a project by expending large sums on construction, or during a long period of administration, may not respond to the disclosures of the environmental consequences of the project in a

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of appeals properly relied. The sole exception is *Sierra Club* v. *Hodel*, 848 F.2d 1068 (10th Cir. 1988). In that case, the court of appeals relied on a quotation from *Save the Yaak Committee* v. *Block*, 840 F.2d 714, 722 (9th Cir. 1988), which cited the *Gambell* directive that "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies." 480 U.S. at 542. The Tenth Circuit then concluded that in the case before it, "the risk of irreparable harm is impossible to assess," but legal remedies were inadequate because permitting construction of the highway at issue there to proceed before completion of the relevant NEPA studies would defeat the purposes of NEPA (848 F.2d at 1097). It is accordingly far from clear that the Tenth Circuit was concluding, despite the teaching of *Gambell*, that a violation of NEPA is enough to constitute the showing of irreparable harm necessary to support injunctive relief. In any event, as we explain *infra*, the instant case is quite different from cases involving "pure NEPA" challenges to the authorization of construction, such as the one before the Tenth Circuit in *Sierra Club*.

neutral or unbiased fashion. The risk that this will happen suffices, under this "procedural" theory, to constitute the irreparable injury necessary to support the issuance of an injunction pending correction of the NEPA violation.

The Second Circuit found that the above procedural theory of irreparable injury, whatever its merits, is inapplicable to this case. Pet. App. A12 n.1. The procedural theory has been articulated in cases based entirely on NEPA; this case, in contrast, also involves the substantive limitations imposed by the Ocean Dumping Act, 33 U.S.C. 1413(a). The court below concluded that the existence here of these substantive limits on agency decisionmaking makes the NEPA-based procedural theory of irreparable injury inapt.[6] That conclusion is clearly correct: where an environmental statute, such as the Ocean Dumping Act, provides substantive standards to govern a decision, those standards furnish the appropriate criteria for determining irreparable injury.

Secondly, even if the procedural theory of irreparable injury advocated by petitioners could support an injunction in a proper case, the possibility of procedurally based irreparable injury must be reasonably related to the facts of the particular case. See, *e.g.*, *Wisconsin* v. *Weinberger*, 745 F.2d 412, 427 (7th Cir. 1984) (refusing to apply theory to ongoing project where "commitment entailed by the remaining construction effort * * * is relatively small, and thus the injunction's service to NEPA in preserving unbiased decision-making would be slight"). In the present case, petitioners sought an injunction in 1988

[6] The First Circuit itself has recognized this limitation on the application of its procedural theory. *Sierra Club* v. *Marsh*, 872 F.2d at 503-504.

to prevent the Corps and its permittees from continuing to use the WLIS III site for the disposal of dredged material, when the site had been used for such purposes since 1982.[7] If the use of WLIS III caused irreparable injury by inducing commitment of the decisionmaker to continuation of the use of that site, that injury must have occurred during the six-year period the disposal site had already been in use. Little additional commitment would be engendered by its additional use for the limited time necessary to complete the environmental documentation required by the courts.[8]

In sum, petitioners can point only to a potential conflict in the circuits on the definition of irreparable injury in NEPA cases: no direct conflict is presented here because, as the court below observed, the substantive standards of the Ocean Dumping Act applicable here provide an adequate basis for distinguishing this case from pure NEPA cases applying the procedural theory of irreparable injury. And even if the circuits have differed to some extent in their analysis of irreparable injury in this context,

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[7] The environmental injury to the site itself, caused by changing it from bare ocean floor to a disposal site, had long since occurred, and could not be reversed by the injunction.

[8] In fact, the situation here is almost identical to that faced by the district court in *Romero-Barcelo* v. *Brown*, 478 F. Supp. 646 (D.P.R. 1979), vacated in relevant part, 643 F.2d 835 (1st Cir. 1981), reversed in relevant part *sub nom. Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). There, the district court refused to enjoin the Navy from conducting training activities on Vieques Island pending compliance with statutory requirements, when no appreciable harm to the environment had been demonstrated and the Navy had been conducting the activities for many years (see 478 F. Supp. at 705-708).

the interests underlying the procedural theory espoused by petitioners—avoidance of bias in the decisionmaker through commitment to the project—have not been squarely established and would in any event be extremely weak in this case. Therefore, the present case is not an appropriate vehicle for articulating generally applicable standards for injunctive relief in NEPA cases.

2. In December 1989, the Corps of Engineers published a draft Supplemental EIS for the designation of WLIS III as a disposal site for dredged material. The comment period is scheduled to close on February 12, 1990. The Corps informs us that the present schedule calls for a final Supplemental EIS in April 1990. Thereafter, the Corps is expected to make a new decision concerning the designation of an appropriate disposal site on the basis of this new EIS, which will correct the deficiencies identified by the courts below in the earlier EIS.

Relief in cases involving procedural violations of federal environmental laws is appropriate only pending completion of the procedures mandated by law. See, *e.g.*, *Minnesota Public Interest Research Group* v. *Butz*, 541 F.2d 1292, 1308 (8th Cir. 1976), cert. denied, 430 U.S. 922 (1977); cf. *Weinberger* v. *Romero-Barcelo*, 456 U.S. at 314. Under the Corps' present schedule, the Supplemental EIS and the application of the Ocean Dumping Act criteria to the WLIS III site will be final this spring. When those events take place, the posture of this case will alter significantly. The present question—whether petitioners can establish irreparable injury to sustain injunctive relief pending completion of the procedures mandated by NEPA and the Ocean Dumping Act—will be replaced by questions concerning the merits,

should petitioners continue to oppose whatever decisions the Corps of Engineers may make. Whether or not petitioners choose to challenge the merits of the forthcoming Corps decision, it is clear that the question presented by the instant petition will become moot once a decision based on the Supplemental EIS has been made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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